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PERWIRA HABIB BANK (M) BHD v. WONG KENG FATT

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[CIVIL SUIT NO: S5-23-261-1987]
12 DECEMBER 2014

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BANKING: *Banker and customer – Duty of care when bank is paying out monies – Disbursement of loan – Whether done in capacity as agent to its customer – Defendant assigned absolutely to bank his rights, title and interest under sale and purchase agreement – Whether bank owed duties of trustee to defendant – Whether there was implied duty on bank to undertake site visits before disbursing loan – Duty of inquiry – Whether there were circumstances putting bank on inquiry as to any fraud perpetrated – Whether bank wrongfully disbursed loan in contravention of its duty – Allegation of fraud against bank – Whether proved – Whether bank's claim for amounts outstanding under loan allowed*

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BANKING: *Banks and banking business – Loan facilities – Disbursement of loan – Duty of care – Defendant assigned absolutely to bank his rights, title and interest under sale and purchase agreement – Whether bank owed duties of trustee to defendant – Whether there was implied duty on bank to undertake site visits before disbursing loan – Duty of inquiry – Whether there were circumstances putting banker on inquiry as to any fraud perpetrated – Whether bank wrongfully disbursed loan in contravention of its duty – Allegation of fraud against bank – Whether proved – Whether bank's claim for amounts outstanding under loan allowed*

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The defendant entered into a sale and purchase agreement ('the SPA') with the developer to acquire a piece of land in Mukim Si Rusa together with a bungalow. The defendant applied for and obtained a housing loan from the plaintiff, a licensed commercial bank, to finance the purchase and construction of the said bungalow ('the Sri Rusa development'). The plaintiff disbursed a significant portion of the loan to the developer, in reliance on architect's certificates which certified that up to 60% of the construction of the defendant's house had been completed. These certificates were subsequently established as false and that no actual work had in fact been carried out in respect of the development. One Cheong Teng Kong (who had signed the SPA on behalf of the proprietors of the land and was described as the person behind the developer) and the architect, one Chong, were subsequently convicted respectively of criminal breach of trust in connection with their involvement in inducing the plaintiff to disburse loans to finance the Sri Rusa Development. Subsequently, the plaintiff demanded for payment of all amounts outstanding under the loan from the defendant, who had failed to make the scheduled payments. The defendant pleaded in his defence, *inter alia*, that the plaintiff had wrongfully disbursed the loan to the developer in contravention of its duty as (i) an arising trustee to the defendant because the defendant had assigned his rights and interests in the subject property arising from the SPA to the plaintiff; and (ii) arising in contract

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under the loan agreement to ensure the works had been properly executed by the developer before disbursing the loan sums to the developer. The defendant also submitted that the plaintiff, together with the developer and the architect, had defrauded the defendant. The principal legal issue examined herein was whether a bank qua lender owed a duty to its customer in carrying out a disbursement of a loan.

Held (allowing plaintiff's claim):

(1) It was advanced on behalf of the defendant that the court should draw an adverse inference from the fact that the first disbursement was made just one day after the loan agreement was signed. While it may be outside the norm for a loan to be disbursed so quickly after execution of the loan agreement, such circumstances could not amount to proof of fraud, bearing in mind that the standard of proof required was beyond reasonable doubt. No evidence was adduced by the defendant to suggest that the plaintiff or any of its employees or agents was in any way involved in the falsification of the architect's certificates. Thus, the defendant had not proven the allegation of fraud on the part of the plaintiff. (paras 23 & 29)

(2) A banker-customer relationship is that of a debtor and creditor, and generally does not impose any fiduciary obligations on the bank. Once a customer notifies its bank that it wishes to draw down on a loan, the bank then owes a duty to the customer to exercise reasonable care and skill in disbursing the relevant portion of the loan amount in accordance with the terms of the loan agreement. This duty of care and skill arose as a result of the fact that the bank is an agent of its customer when disbursing a loan to the instructions and for the benefit of the customer or when effecting a payment instruction on behalf of the customer. The position that a bank in disbursing a loan is doing so in the capacity as agent to its customer was accepted by the Supreme Court in *Hoo See Sen & Anor v. Public Bank Bhd & Anor*. However, the limited fiduciary duties of a bank in such circumstances do not automatically make the bank a constructive trustee for the customer. Hence, the plaintiff did not owe duties of a trustee to the defendant, regardless of the fact that the defendant had assigned absolutely to the plaintiff his rights, title and interest under the SPA. (paras 30, 31, 35 & 36)

(3) There was no implied contractual term that the plaintiff's duty of care and skill extended to undertaking a site visit or verifying the authenticity of the architect's certificate, as such an implied term would be in contradiction with the express provisions of cl. 10 of the loan agreement. The duties arising in equity and under contract are co-extensive. As such, because the plaintiff did not owe the defendant a duty in contract to undertake site visits, it must necessarily mean that the plaintiff also did not have any fiduciary duty as agent to do so. (paras 47-49)

(4) In dealing with certifications of progress payments, it was not reasonable to expect bankers to approach architect's or engineer's certificates with inherent disbelief or suspicion. As the architect is a professional in his own right, it would be entirely reasonable for the bank to regard architect's certificates as genuine, in the absence of any circumstances that would cast doubt on their authenticity. Herein, there were no circumstances that would have put an ordinary prudent banker on inquiry as to the fraud perpetrated by the developer. Thus, there were no circumstances that would have put the plaintiff on a duty of inquiry. (paras 51-54)

Case(s) referred to:
Abdul Rahim Abdul Hamid v. Perdana Merchant Bankers Bhd [2006] 3 CLJ 1 FC ***(dist)***
Arab-Malaysian Merchant Bank Bhd v. Court Square Pelita Sdn Bhd [2000] 1 LNS 1 HC ***(refd)***
Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor [2014] 2 CLJ 773 CA ***(refd)***
Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd [1993] 2 CLJ 495 SC ***(refd)***
Bank of Scotland v. A Ltd [2001] EWCA Civ 52 ***(refd)***
Barclays Bank plc v. Quincecare Ltd [1992] 4 All ER 363 ***(refd)***
BP Refinery (Westernport) Pty Ltd v. Hastings Shire [1978] 52 ALJR 20 PC ***(refd)***
Cheah Swee Fah v. Bank Bumiputra Malaysia Berhad & Anor [2008] 3 CLJ 132 CA ***(refd)***
Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134 SC ***(refd)***
Edward Thomas Foley v. Thomas Hill and Others [1848] 2 HL Cas 28 ***(refd)***
ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd [2004] 4 CLJ 674 CA ***(refd)***
Hoo See Sen & Anor v. Public Bank Bhd & Anor [1988] 1 CLJ (Rep) 125 SC ***(refd)***
Lipkin Gorman v. Karpdale Ltd [1992] All ER 409 ***(refd)***
Ng Thiam Seng v. Am Finance Bhd [2009] 10 CLJ 390 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 103
Rules of the High Court 1980, O. 14A

For the plaintiff - Samuel Tan; M/s Shook Lin & Bok
For the defendant - Saranjit Singh; M/s Saranjit

Reported by Suhainah Wahiduddin

JUDGMENT

Azizul Azmi Adnan JC:

Introduction

[1] The plaintiff, which is now known as Affin Bank Berhad, is a licensed commercial bank. In 1985, it granted a housing loan to Mr Wong Keng Fatt, the defendant in this action, to finance the purchase and construction of a bungalow to be located in Mukim Si Rusa, Port Dickson. Mr Wong's bungalow

was one of several to be constructed in a development project undertaken by a company known as The Regent Housing Development Sdn Bhd ('the developer'). A

[2] The plaintiff had disbursed a significant portion of the loan to the developer, in reliance on architect's certificates that have been subsequently established as false. Although the certificates confirmed that up to 60% of the construction of the defendant's house had been completed, the truth was that no such development had been carried out. B

[3] In 1987, the plaintiff commenced action against the defendant to recover the amounts disbursed to the developer, together with interest on the principal amount loaned out. For reasons unknown, there was an inordinate delay between the time the suit was filed, and the date on which the case was heard, none of which delay was the fault of either party to this action. The delay meant that the accrued interest on the RM140,000 principal amount loaned by the plaintiff has ballooned to in excess of a million ringgit as at the date of the trial in 2014. C D

[4] One of the principal legal issues examined in this case is whether a bank *qua* lender owes a duty to its customer in carrying out a disbursement of a loan.

Salient Facts E

[5] On 10 April 1985, the defendant entered into a sale and purchase agreement ('the SPA') with the developer to acquire a piece of land in the Mukim of Si Rusa together with a double-storey detached bungalow. The land was owned by two individual proprietors, on whose behalf one Mr Cheong Teng Kong had executed the SPA by way of a power of attorney. F

[6] The purchase price under the SPA was RM280,000. Even before the execution of the SPA, the defendant had paid RM84,000 to the developer, representing 30% of the purchase price.

[7] The defendant applied for and obtained a housing loan from the plaintiff to finance the remainder of the purchase price of the property, amounting to RM196,000. A letter of offer ('the letter of offer') was issued by the plaintiff to the defendant on 11 May 1985 and accepted by the defendant on 15 May 1985. On 12 June 1985, a loan agreement ('the loan agreement') and a deed of assignment ('the deed of assignment') were entered into between the plaintiff and the defendant. G H

[8] For the purposes of obtaining a loan, a copy of the defendant's income tax notice of assessment issued by the then Department of Inland Revenue (Form J) dated 5 May 1985 was submitted to the plaintiff. This form was subsequently established in evidence to have been falsified, although there is no suggestion that the defendant was in any way involved in its falsification. However, nothing in this case turns on this fact. I

[9] On 13 June 1985, the plaintiff disbursed RM84,000 to the developer. On 9 July 1985, a further RM56,000 (representing 20% of the purchase price under the SPA) was disbursed. It is important to note that there were just 26 days between the first and second disbursements.

[10] In disbursing these amounts, the plaintiff relied upon two architect's certificates issued by William KC Chong Bersekutu, a firm of certified architects. These documents, dated 22 May 1985 and 6 July 1985, purported to certify that 40% and 60% respectively of the stages of work had been completed by the date of each certificate.

[11] Mr Chong King Choong, the architect whose name and signature appeared on the certificates, was called by the plaintiff as a witness. By his testimony, he denied having certified that any of the stages of work had been completed, and gave evidence that he had only certified that 10% of the price payable under the SPA was due, on the basis that the first 10% was due upon signing of the SPA. This leads this court to the conclusion that these certificates had been falsified.

[12] It was established in evidence that no actual work had in fact been carried out in respect of the development, and that the land remained abandoned to this date. The defendant is one of six individuals who had obtained loans from the plaintiff to purchase houses in the Si Rusa development.

[13] Mr Cheong Teng Kong (who had signed the SPA on behalf of the proprietors of the land and who was described at the trial by Mr Wong, the defendant, as the person behind the developer) and the architect Mr Chong were subsequently convicted in 1991 and 1995 respectively of criminal breach of trust in connection with their involvement in inducing the plaintiff to disburse loans to finance the Sri Rusa development.

[14] Given the lapse of time between the date of the conviction of these individuals and the date of this trial, it was not possible for this court to obtain the records of those earlier proceedings. Had such records been available, this court may have been entitled to take judicial notice of the curial findings in those earlier proceedings.

[15] Nonetheless, for the purposes of the present proceedings, it is not necessary for me to ascertain how the architect's certificates came to be falsified. The evidence given by the architect Mr Chong established the fact that the certificates were falsified and this was not disputed in evidence. It ought to be noted also that there was no suggestion that the defendant was in any way involved in the falsification of the certificates or in defrauding the plaintiff.

[16] The defendant did not make the scheduled repayments for the loan, and on 23 December 1986, the solicitors for the plaintiff demanded for payment of all amounts outstanding under the loan.

Decision

[17] Having considered the evidence and heard submissions from the counsels of both parties, I grant judgment for the plaintiff and order that:

(a) The defendant pays to the plaintiff the amount of RM162,417.15, being the amount outstanding as at 30 November 1986, with interest at a rate of 4.75% per annum above the plaintiff's base lending rate from 1 December 1986 to the date of full payment; and

(b) The defendant pays to the plaintiff costs of RM20,000.

[18] The reasons for my decision are set out in the following paragraphs.

Analysis

[19] The plaintiff's case was premised simply on the fact that it had disbursed part of the loan pursuant to and in accordance with the terms of the loan agreement, and that the defendant had failed to repay the amount he owed the plaintiff. These facts are not in dispute.

[20] The terms of the letter of offer and loan agreement provide that the loan may be released by the plaintiff in a single disbursement or by way of progressive release as and when the plaintiff was satisfied that the stage of construction of the property in accordance with the terms of the SPA justified the advance. In addition, cl. 2 of the deed of assignment provides for the obligation of the plaintiff to release the loan amount progressively upon receipt of architect's certificates in accordance with the SPA. Under cl. 4 of the SPA, any demand for payment has to be supported by an architect's certificate, which certificate constituted proof that the works referred to in the certificate had been completed.

[21] The defendant pleaded in his defence that:

(a) The plaintiff had wrongfully disbursed the loan to the developer in contravention of its duty to the defendant:

  (i) Arising as trustee to the defendant. The plaintiff was acting as trustee to the defendant because, the defendant argued, the defendant had assigned his rights and interests in the subject property arising from the SPA to the plaintiff; and

  (ii) Arising in contract under the loan agreement to ensure the works had been properly executed by the developer before disbursing the loan sums to the developer; and

(b) The plaintiff, together with the developer and the architect, had defrauded the defendant.

[22] These are considered in the following paragraphs.

Fraud

[23] Dealing first with the issue of fraud. At the trial, no evidence was adduced by the defendant to suggest that the plaintiff or any of its employees or agents was in any way involved in the falsification of the architect's certificates.

[24] As to the standard of proof for fraud in civil cases, the Supreme Court in *Chu Choon Moi v. Ngan Sew Tin* [1985] 1 LNS 134; [1986] 1 MLJ 34 had held as follows:

> We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture (*Narayanan v. Official Assignee*, Rangoon AIR 1941 PC 93; *Saminathan v. Pappa* [1981] 1 MLJ 121). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt. (See "proved" at s. 3 of the Evidence Act, 1950 and *Liew Kaling & Ors v. PP* [1960] MLJ 306.)

[25] It was received in evidence that a former bank manager of the plaintiff, Encik Wan Chik bin Din, together with Mr Cheong Teng Kong and Mr Chong King Choong, were convicted of criminal breach of trust in connection with the development relating to this present action. Counsel for the defendant contended that the plaintiff cannot therefore profit from the fraud perpetrated by its employee.

[26] However, there is in fact no evidence that Encik Wan Chik bin Din was the bank manager involved in the loan to the defendant. On the contrary, the documentary evidence before this court shows that the manager of the Mindef branch at the material time, whose name and signature appears on the relevant loan documentation, was Encik Abdul Rahman bin Mohd Noh, who was not in any way implicated in the fraud.

[27] The defendant had testified before this court that he had given evidence at the criminal trial of Encik Wan Chik bin Din as a witness. However, both Mr Cheong Teng Kong and Mr Chong King Choong were also the accused persons in the trial, and therefore the presence of the defendant as witness at the trial in question does not amount to conclusive proof that Encik Wan Chik bin Din was also involved in the grant of the loan in the present instance.

[28] Counsel for the defendant invited this court to draw an adverse inference from the fact that Encik Wan Chik bin Din was not called by the plaintiff to give evidence. However, the onus of proof of fraud in this particular instance lies with the defendant, in accordance with s. 103 of the

Evidence Act 1950. It is not for the plaintiff to disprove fraud and hence the fact that the plaintiff had not called Encik Wan Chik bin Din is of no consequence to the plaintiff's case.

[29] The argument was also advanced on behalf of the defendant that the court should draw an adverse inference from the fact that the first disbursement was made just one day after the loan agreement was signed. While it may be outside the norm for a loan to be disbursed so quickly after execution of the loan agreement, such circumstances cannot amount to proof of fraud, bearing in mind that the standard of proof required is beyond reasonable doubt. This court finds that the defendant has not proven the allegation of fraud on the part of the plaintiff.

Duties Owed By A Banker To Its Customer

[30] It is settled law that a banker-customer relationship is that of a debtor and creditor, and generally does not impose any fiduciary obligations on the bank. The judgment of Abdul Malik Ishak JCA in the Court of Appeal decision of *Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773; [2014] 4 MLJ 619 at paras. 90 to 116 sets out a comprehensive review of the applicable case law on point. His Lordship in that case cited with approval the following passage from the judgment of Lord Brougham in the House of Lords case of *Edward Thomas Foley v. Thomas Hill and Others* [1848] 2 HL Cas 28:

> This trade of a banker is to receive money, and to use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor. That being the trade of a banker, and that being the nature of the relation in which he stands to the customer, I cannot, without breaking down the bounds between equity and law, – without, as it were, removing the land-marks of jurisprudence, – I cannot at all confound the situation of a banker with that of a trustee, and conclude that the banker is a debtor with a fiduciary character.

[31] Accordingly, the general position of the law at least, does not support the proposition by the defendant that the plaintiff owes duties of a trustee to the defendant.

[32] However, even though a banker-customer relationship *simpliciter* would not in general give rise to fiduciary obligations on the part of the bank, a bank may nonetheless be subject to the application of equitable doctrines in certain circumstances. In *Bank of Scotland v. A Ltd* [2001] EWCA Civ 52, a decision of the English Court of Appeal, Lord Woolf CJ stated:

> ... On the face of it the relationship between a bank and its customer is not a fiduciary relationship. It is a commercial relationship founded in contract into which the intrusion of equitable doctrines such as constructive notice may result in the well-known words of Lindley LJ in *Manchester Trust v. Furness* [1895] 2 QB 539, 545, in "doing infinite mischief and paralysing the trade of the country". ...

> Nevertheless, it is clear that a bank may become subject in equity to an accessory liability if it dishonestly assists in a breach of trust committed either by its customer or by others. When a bank account is in credit the bank's relationship to the customer is that of debtor, not trustee (*Foley v. Hill* (1848) 2 HL Cas 28). But if the debt owed to the customer is affected by any equitable interest or claim of a third party the bank may become accountable in equity if it dishonestly assists in any course of action which disregards the third party's interest or claim.

[33] The common law has also developed to impose on a bank in certain limited circumstances a duty to exercise reasonable care and skill, arising both in equity as a result of the fiduciary obligations imposed in a principal-agent relationship, and at law, as an implied contractual term. In the English case of *Barclays Bank plc v. Quincecare Ltd* [1992] 4 All ER 363, Steyn J stated:

> Primarily, the relationship between a banker and customer is that of debtor and creditor. But quoad the drawing and payment of the customer's cheques as against the money of the customer's in the banker's hands the relationship is that of principal and agent: see *Westminster Bank Ltd v. Hilton* [1926] 43 TLR 124 at 126 per Lord Atkinson. Similarly, when the bank in the present case acted on an order to transfer by immediate money transfer money from the Quincecare current account to Philip Evans & Co in Bournemouth, the bank was acting as Quincecare's agent. As agent the bank owed fiduciary duties to Quincecare: see *Bowstead on Agency* (15th edn) pp. 156 to 160. *Prima facie* every agent for reward is also bound to exercise reasonable care and skill in carrying out the instructions of his principal: *Bowstead* p. 144. There is no logical or sensible reason for holding that bankers are immune from such an elementary obligation. In my judgment it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing the customer's orders.

[34] It is important to note that Steyn J expressly restricted his observations to the relationship of banker and customer in the context of a bank transferring money from a current account on the customer's instructions.

[35] In my judgment, this duty of care and skill also applies where a bank is to effect disbursement of a loan to the order or for the benefit of a customer, which is the situation with which we are concerned in the present instance. Once a customer notifies its bank that it wishes to draw down on a loan, the bank then owes a duty to the customer to exercise reasonable care and skill in disbursing the relevant portion of the loan amount in accordance with the terms of the loan agreement. This duty of care and skill does not arise simply as a result of the depositor-banker relationship (where the bank is the debtor and the customer the lender) or the borrower-banker relationship (where the bank is the lender and the customer the debtor), but rather as a result of the fact that the bank is an agent of its customer when disbursing a loan to the instructions and for the benefit of the customer or when effecting a payment instruction on behalf of the customer. The position

that a bank in disbursing a loan is doing so in the capacity as agent to its customer was accepted by the Supreme Court in Malaysia in *Hoo See Sen & Anor v. Public Bank Bhd & Anor* [1988] 1 CLJ (Rep) 125; [1988] 2 MLJ 170.

[36] It has to be borne in mind that the limited fiduciary duties of a bank in such circumstances do not automatically make the bank a constructive trustee for the customer. For a detailed discussion on the subject of fiduciary obligations, constructive trusts and the duty to account as well as the proper use of these terms, see the judgment of Gopal Sri Ram JCA (as His Lordship then was) in *ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd* [2004] 4 CLJ 674; [2005] 2 MLJ 422.

[37] What precisely is the duty of care and skill that is owed by a banker to its customer? The fiduciary duties of a bank as agent in effecting payments on behalf of a customer must be balanced against the other, countervailing contractual duties of a banker, such as the duty to execute payment instructions promptly. Steyn J considered the question in *Quincecare*, in the context of a fraudulent instruction given by the managing director of a customer:

> Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, it is nevertheless a duty which must generally speaking be subordinate to the bank's other conflicting contractual duties. *Ex hypothesi* one is considering a case where the bank received a valid and proper order which it is *prima facie* bound to execute promptly on pain of incurring liability for consequential loss to the customer. How are these conflicting duties to be reconciled in a case where the customer suffers loss because it is subsequently established that the order to transfer money was an act of misappropriation of money by the director or officer? If the bank executes the order knowing it to be dishonestly given, shutting its eyes to the obvious fact of the dishonesty, or acting recklessly in failing to make such inquiries as an honest and reasonable man would make, no problem arises: the bank will plainly be liable. But in real life such a stark situation seldom arises. The critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make inquiries as to the legitimacy of the order? In judging where the line is to be drawn there are countervailing policy considerations. The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers. In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the

A order is an attempt to misappropriate the funds of the company (see proposition (3) in *Lipkin Gorman v. Karpnale Ltd* (1986) [1992] 4 All ER 331 at 349, [1987] 1 WLR 987 at 1006). And, the external standard of the likely perception of an ordinary prudent banker is the governing one. That in my judgment is not too high a standard.

B **[38]** The decision of the English Court of Appeal in *Lipkin Gorman v. Karpdale Ltd* [1992] All ER 409, although reversed by the House of Lords on other points, remains good law in as far as it pertains to the duty of a banker to its customer. The test, as formulated by Parker LJ is as follows:

C The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility *albeit* not amounting to a probability that its customer might be being defrauded …

[39] It is the view of this court that the principles set out in the *Quincecare* and *Lipkin Gorman* apply both in Malaysia and in the context of the situation D where the bank is effecting disbursement of a loan to, or at the instructions of, its customer, on the basis of the Supreme Court decision in *Hoo See Sen* where it was held that a bank does so as agent for its customer.

[40] The applicable test is as follows: a bank would be liable for breach of its duty to exercise reasonable skill and care in executing a customer's order E to transfer money or in disbursing a loan to the instructions or for the benefit of its customer if:

(a) The bank executes the order or instruction knowing it to have been dishonestly given or procured;

F (b) The bank shuts its eyes to the obvious fact of the dishonesty;

(c) The bank acts recklessly in failing to make such inquiries as an honest and reasonable man would make; or

(d) The bank has been "put on inquiry" in the sense that an ordinary prudent banker would have reasonable grounds (though not proof) for G believing that the order or instruction is an attempt to misappropriate money or that there is something otherwise amiss, and does not carry out inquiries that were reasonable in the circumstances.

[41] A bank's duty of care and skill arising in equity is co-extensive with H its implied duty arising in contract. In *Lipkin Gorman*, Parker LJ stated:

It is in my view clear that the bank could not have rendered itself liable as constructive trustee unless it was also liable for breach of contract and that if it was not liable for breach of contract it could not be liable as constructive trustee. This is because, stated in broad terms, the bank's duty to pay cheques signed in accordance with its mandate is subject to I the qualification that it must be performed without negligence and that (i) negligence may exist where there is no question of the circumstances

> giving rise to a finding of constructive trusteeship, (ii) if there is no negligence I cannot envisage, at least in this case, any facts which would found liability on the ground of constructive trusteeship.

[42] There are strict prerequisites to be fulfilled before a term can be implied into a contract, and these include the requirement that a term to be implied cannot be in conflict with an express provision of the contract. Lord Simon on behalf of the majority in the decision of the Judicial Committee of the Privy Council in *BP Refinery (Westernport) Pty Ltd v. Hastings Shire* [1978] 52 ALJR 20 stated:

> Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

[43] The maxim *expressum facit cessare tacitum* has been applied in Malaysia in *Arab-Malaysian Merchant Bank Bhd v. Court Square Pelita Sdn Bhd* [2000] 1 LNS 1; [2005] 5 MLJ 273:

> It is a canon of construction that an express term in a contract excludes the possibility of implying any term dealing with the same subject-matter as the express term.

[44] The following paragraphs consider the application of the law to the facts of the present case.

The Liability Of The Plaintiff To The Defendant

[45] On the first issue of trustee duties, as outlined in paras. 30 and 31 *ante* it is settled law that the banker-borrower relationship *simpliciter* does not impose any fiduciary obligations on the bank. The fact that the defendant has by executing the deed of assignment assigned absolutely to the plaintiff all his rights, title and interest under the SPA does not change this fundamental position.

[46] The next question is whether the plaintiff bank's duty of care and skill required it to have undertaken a site visit to the property to ascertain whether the development had progressed in the manner certified in the architect's certificates.

[47] Clause 10 of the loan agreement makes it abundantly clear that the plaintiff does not have any obligation to ensure that the property has been duly and properly constructed:

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10. The borrower confirms that notwithstanding the assignment it shall be the responsibility of the borrower and not the bank to ensure that the building shall be duly and properly constructed by the vendor and vacant possession thereof delivered to the borrower in accordance with the specifications and terms of the sale and purchase agreement.

B **[48]** Therefore, there cannot exist an implied contractual term that the plaintiff's duty of care and skill extends to undertaking a site visit or verifying the authenticity of the architect's certificate, as such an implied term would be in contradiction with the express provisions of cl. 10 of the loan agreement.

[49] As we have seen in para. 41 *ante*, the duties arising in equity and under C contract are co-extensive. As such, because the plaintiff does not owe the defendant a duty in contract to undertake site visits it must necessarily mean that the plaintiff also does not have any fiduciary duty as agent to do so.

[50] The next question is, applying the test set out in para. 40 *ante*, whether the bank had known about the fraud by the developer or the falsified D architect's certificates, or had wilfully shut its eyes to the obvious fact of the dishonesty, or was reckless in failing to make inquiries as an honest and reasonable man would, or whether there had been reasonable grounds that would have led an ordinary prudent banker to make additional inquiries.

E **[51]** There is no evidence before me that suggests that the bank had known about, or had wilfully overlooked, the fraud perpetrated by the developer or the falsified architect's certificates.

[52] In as far as the first architect's certificate dated 22 May 1985 is concerned, I find that there were no circumstances that would have put the F plaintiff on a duty of inquiry, and that the plaintiff was not reckless in failing to make further inquiries.

[53] It was contended on behalf of the defendant that the fact that the second architect's certificate was issued on 6 July 1985, so shortly after the first certificate, would have put the plaintiff on inquiry. The difference between G the two certificates were items 2(d) and (e) in the stages of work, namely:

(a) The roofing, electrical wiring and plumbing (without fittings) of the property; and

(b) Internal and external plastering of the property.

H **[54]** Although a period of 26 days between the two certificates is short, I find that it is not inherently implausible for these items of work to have been completed within such period, and therefore the circumstances would not constitute grounds that would have led an ordinary prudent banker to have made additional inquiries. In dealing with certifications of progress I payments, it is not reasonable to expect bankers to approach architect's or engineer's certificates with inherent disbelief or suspicion. On the contrary, as the architect is a professional in his own right, it would be entirely reasonable for the bank to regard architect's certificates as genuine, in the

absence of any circumstances that would cast doubt on their authenticity. In the present instance, the only evidence cited in support of the proposition that the bank ought to have been put on inquiry was the 26-day period between certificates. This I hold to be insufficient to constitute reasonable grounds.

[55] I am fortified in this finding by the unreported case of *Perwira Habib Bank Malaysia Berhad v. Thong Sum Chin* Suit No. S7-22-13-90, a case involving the same plaintiff bank, the developer and the same development project in Mukim Si Rusa. It was held in this case that the bank was entitled to rely on the architect's certification of the work done, although it appeared that the two certificates in this case were issued within a period of one and a half months of one another.

[56] Mr Lee Lai Kuen, the second witness for the plaintiff, testified that the standard banking practice of the plaintiff at the time did not require it to undertake a site visit prior to disbursement of any housing loan. Mr Lee also testified that this practice had since changed, and that the bank's current procedures, which has been in place for the last 20 years or so, do require a site visit to be undertaken prior to disbursement.

[57] I do not accept contentions by counsel for the defendant that this means that there is a duty owed to the borrower to undertake site visits. The express terms of cl. 10 of the loan agreement precludes the possibility of such duty being owed to the defendant. The procedures adopted by a bank are prudential measures aimed at protecting its own commercial interest in granting a loan. The fact that there are such procedures do not mean that the bank owes a duty to the customer to adhere to those procedures. In any event, there is uncontroverted evidence from the witness for the plaintiff, Mr Lee, that such procedures did not exist at the material time.

[58] Counsel for the defendant further argued in the course of submissions that the plaintiff was negligent in effecting the disbursement in reliance upon the falsified architect's certificates and without verification of the progress of the construction works. However, negligence was not pleaded by the defendant in his defence. In my judgment, even if it were pleaded, no liability would lie on the plaintiff for the same reasons outlined in the preceding paragraphs.

[59] In summary:

(a) The plaintiff does not owe duties of a trustee to the defendant, regardless of the fact the defendant had assigned absolutely to the plaintiff his rights, title and interest under the SPA;

(b) There is no implied duty in contract on the plaintiff bank to undertake site visits, as there is an express contractual provision in the loan agreement that makes it clear that the plaintiff has no obligations in this regard;

(c) If there is no duty in contract, no duty can arise in equity or tort, due to the principle that these duties are co-extensive. In any event, the defendant had not pleaded negligence in his defence;

(d) On the facts, there were no circumstances that would have put an ordinary prudent banker on inquiry as to the fraud perpetrated by the developer.

[60] In the following paragraphs I address some of the cases that were cited in argument by counsels, to the extent that these cases have not been already addressed in the preceding paragraphs.

Cases Cited In Submissions

[61] The discussion on specific cases is prefaced with the observation that these cases would have been decided on their particular facts. I can do no better than to repeat the words of Parker LJ in *Lipkin Gorman*:

> That a bank has a duty of care to its customers when carrying out its mandate is beyond doubt, but so to state advances matters but little, for in each case the question for decision is whether a bank has failed in that duty and there are very many cases on the subject, a considerable number of which were cited in argument. In my view such cases must be approached with caution, for essentially they are no more than decisions of fact, ie, of the application of the law to an endless variety of circumstances. Expressions in them, such as that a paying bank must pay under its mandate save in extreme cases, or that a bank is not obliged to act as an amateur detective, or that suspicion is not enough to justify failing to pay according to the mandate, or other like observations which are to be found in the cases, are no more than comments on particular facts or situations and embody in my view no principles of law. Furthermore, what would or might have been held to be a breach of duty at one time may not be a breach of duty at another.

[62] Accordingly, the utility of such cases lies with the general principles that can be gleaned from the decisions, and not with the actual findings *per se*. I have nonetheless included a discussion of these cases not only for completeness, but also for the purposes of reconciling my findings with these decisions.

[63] In *Abdul Rahim Abdul Hamid v. Perdana Merchant Bankers Bhd* [2006] 3 CLJ 1, [2006] 5 MLJ 1, the Federal Court reversed the decision of both the Court of Appeal and the High Court in holding that the bank had breached its duty to its customer. This case involved a wholesale loan, where the terms of the facility agreement were specifically negotiated between the bank and the borrower. The working drafts contained a provision that the drawdown was supposed to have been made in two tranches. The signed document however provided for a bullet drawdown. The managing director of the borrower testified that not only was he not told by the bank that the execution copies contained this material change but also that the officer of the bank handling the loan had informed him that the execution copies were the same as the working draft, which they plainly were not.

[64] It is clear from the judgment of Pajan Gill FCJ that the representation from the bank officer was a factor that weighed heavily in the minds of the learned Federal Court Judges. In fact it may be argued that this case did not involve the execution of any customer order or payment instruction at all. The Federal Court made a finding that there was a relationship of trust and reliance between the managing director of the borrower and the bank officer so as to place the bank in the position of a fiduciary *vis-à-vis* the borrower. The failure of the bank to inform its customer of the change in the drafting in the execution version of the loan documentation, as well as the misrepresentation from the bank officer (which the trial judge noted as a disputed fact) caused the bank to be in breach of the duty of care that it owed to the customer.

[65] I distinguish *Abdul Rahim Abdul Hamid v. Perdana Merchant Bankers Bhd* from the present case on the basis that there is no evidence before me that suggests that there existed a relationship of trust and reliance between Mr Wong the defendant and the plaintiff bank. Accordingly, the plaintiff owes no fiduciary duties to the defendant save and except the duty to exercise reasonable care and skill in effecting the disbursement of the loan, which I have held in paras. 46 to 57 *ante* not to have been breached.

[66] It was contended on behalf of the defendant that the case of *Hoo See Sen & Anor v. Public Bank Bhd & Anor* was an authority for the proposition that a bank is a trustee of the sums that are to be disbursed under a loan. This case involved an application for an interim injunction to restrain a bank from releasing the loan amount to a developer, on account that the sums owed as liquidated and ascertained damages by the developer to the borrower was larger than the balance purchase price due from the borrower to the developer. Salleh Abas LP stated in this case:

> We also observe that cl. 4 of the deed of assignment clearly spells out what has been assigned and what has not been assigned. For the sake of clarity, we set out below the wording of this clause, which is as follows:
>
> > 4. For the consideration aforesaid the borrowers as beneficial owners hereby absolutely assign to the bank the said property and the full and entire benefit of the sale agreement together with all rights title and interests of the borrowers therein. Provided always that notwithstanding the assignment hereinbefore contained or any other provision of this agreement the borrowers shall and hereby undertake to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the borrowers expressed and contained in the sale agreement.
>
> It is clear from this clause that the appellants assigned to the first respondent only the rights regarding the property and the appellants' rights under the sale and purchase agreement. Because of this, the appellants are still bound and continued to be bound to observe and perform all the duties and liabilities under the sale and purchase

A agreement. Payment of the balance of the purchase price, which is purportedly due from the appellants, is such liability, which is not the liability of the first respondent, but the liability of the appellants. Thus, under no circumstances was the first respondent bound or even authorized to make such payment and indeed *the position of the first respondent in the matter of disbursing the loan is in the capacity of an agent to the appellants. The first respondent is holding the* B *loan sum on behalf of the appellants and is bound to release the money only when authorized to do so, and this must be for the benefit of the appellants.*
[Emphasis added]

[67] In my judgment, this case is authority for the proposition that a bank acts as agent for the borrower when making disbursements to third parties, C and would accordingly owe a duty of care and skill (on the principle established in *Quincecare* and *Lipkin Gorman*). It does not mean, however, that the bank is also automatically a constructive trustee of the sums disbursed, in the absence of any circumstances that justify, in the words of Lord Woolf CJ in *Bank of Scotland v. A Ltd*, the intrusion of equitable D doctrines.

[68] Counsel for the defendant cited the case of *Ng Thiam Seng v. Am Finance Bhd* [2009] 10 CLJ 390; [2008] MLJU 491 in the course of submissions. This case was determined under the summary procedure of O. 14A of the Rules of the High Court 1980 and involved payments made to a E developer after lapse of the period within which the project was due to have been completed. It was held that the borrower had a legitimate expectation that no further progress releases were made to the developer. The learned High Court Judge in that case stated:

F [27] In law a fiduciary relationship exists between an agent and the principal. The agent assumed an obligation of loyalty to his principal and must act under his instruction and in his best interest. In the instant case as an agent of the plaintiffs with respect to making progress releases, the defendant was obliged, in the words of Salleh Abas LP in *Hoo See Sen* to act "for the benefit" of the plaintiffs purchaser.

G ...

[29] The duty to act in the best interest of the principal includes acting with diligence. Its duty extends beyond sighting the Architect Certificate certifying the stage of completion and paying the amount to the developer. It is therefore not open to the defence that it was under no H obligation to keep vigil over the progress of the construction of the condominium or that did not have any notice of the stages of its progress.

[69] Both counsels missed the fact that this decision of the High Court was set aside by the Court of Appeal and remitted back to the High Court for full trial, where it was held that, on the facts, the financier did not owe any I fiduciary duties to the borrower. Accordingly, the decision of the High Court at first instance cannot be considered an authority for the proposition that the duty placed on a lending bank requires it in all cases to look beyond an

architect's certificate and to monitor the use of the proceeds or the progress of construction. In my judgment, such a duty would be too onerous an obligation, in the absence of circumstances that would have put an ordinary prudent banker on inquiry.

[70] I had requested counsels to consider the case of *Cheah Swee Fah v. Bank Bumiputra Malaysia Berhad & Anor* [2008] 3 CLJ 132; [2007] 7 MLJ 481. In this case, the plaintiff borrower alleged that the defendant bank was wrong to have released the eighth progress payment to the developer based on an architect's certificate confirming that the roads and drains in the development had been completed, when in fact there were no such roads or drains serving the houses. The Court of Appeal held that:

> We agree with the finding of the learned judge of the High Court that to impose on the bank any duty to ascertain the actual situation at the site or even for it to make inquiries would indeed place an onerous duty on the bank. It is our judgment that in the absence of clear evidence that the first defendant was aware of the actual situation, or that being aware that there was something amiss in the architect's certificate, when it made the payment, it could not be said that the first defendant was in breach of any of its duties.

[71] This case is, in my view, consistent with the test set out in para. 40 *ante*.

[72] However, the Court of Appeal was also of the view that the contractual duty of care in carrying out payment instructions was inapplicable:

> [12] On the Common Law principle that the paying banker owes his customer a contractual duty of care in carrying out payment instructions as stated in Paget's *Law of Banking*, 10th edn, [1989] p. 202 which was referred to and relied on by learned counsel for the plaintiff we find it is not relevant to the present case. The principle is only applicable to cases dealing with communications which the customer send to the bank. On this point we would refer to the case of *Hilton v. Westminster Bank Ltd* [1926] 123 LT 358 wherein an action was brought for damages of negligence against the bank in paying a cheque of the customer upon presentation, and the negligence alleged was that the bank paid the cheque after receiving notice of countermand or alternatively after having received instructions which should have put them on inquiry as to the exact meaning of the instructions which they had in fact received. At p. 362 Atkin J said: "I think it is the duty of the bank, arising out of the contract to exercise reasonable care and skill in dealing with communications which the customer sends to them in relation to his banking business." In the present case it must be noted that the court is dealing with an architect's certificate.
>
> [13] It is our judgment that this case has to be decided on the proper interpretation of the contract entered into between the first defendant and the plaintiff. The express terms as provided for in the loan agreement are clear. The plaintiff has expressly authorized the first defendant to release the progressive payments directly to the developer's account as against the architect's certificate.

[73] In my view, the contractual duty of care does extend to circumstances where the banker-customer relationship is one where the bank is the lender and the customer the borrower, on the authority of the Supreme Court decision in *Hoo See Sen*. This duty arises as a result of the bank being an agent of the customer when effecting disbursements of a loan on behalf of the customer. Nonetheless, like our present case, there was no duty in *Cheah Swee Fah* on the bank to look beyond the architect's certificate, because the express terms of the contract entitled the bank to release payment against the certificate and therefore negated the existence of any implied contractual term to the contrary.

[74] The final case relied upon by the defendant was *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd* [1993] 2 CLJ 485; [1993] 2 MLJ 76, which I do not find relevant to the issues at hand. The *ratio* of this case was that the facility that the bank had thought was an overdraft facility was recharacterised as a bridging term loan facility on the proper construction of the contract. In his judgment, Edgar Joseph Jr SCJ provided alternative grounds for holding that the bank was in breach of contract should the proper construction of the contract establish that the financing facility was in fact an on-demand overdraft facility. The "periodical survey" referred to in His Lordship's judgment did not refer to a survey of the progress of the development project, but rather to a periodic review of the status of the facility, which must be conducted prior to terminating the on-demand loan. The bank was held to have wrongfully terminated the facility as there was no evidence that it had carried out the periodic reviews of the facility, and it did not give the borrower a reasonable time for repayment.

[75] For the reasons set out above, I allow the plaintiff's claim on the terms set out in para. 17 *ante*.